Supreme Court, U.S.
FILED
051455 APR 25 2006
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

GARY K. PRUITT, *Petitioner*
v.
MAUREEN C. PRUITT, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

Petition for a Writ of Certiorari

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April 25, 2006

ISSUES PRESENTED

ISSUE NO. 1.

May a State Domestic Relations Court Divide Parties' Social Security Benefits in a Division of Property, Directly or Indirectly, in Violation of Section 407, Assignment of Benefits, 42 U.S.C. 407, and the Supremacy Clause of the United States Constitution, Thereby Frustrating Federal Law and Policy.

ISSUE NO. 2.

Was the Appellant Denied Due Process of Law by the Imposition and Enforcement of a Support Order in Violation of Section 303 of the Federal Consumer Credit Protection Act and the Supremacy Clause of the United States Constitution, Where the Trial Court Forfeited His Home and the Reviewing Court Upheld Both Actions Applying Criminal, Rather than Civil, Contempt Standards?

PARTIES TO THE PROCEEDING

The following individuals are parties to the proceeding in the Courts below:

Gary K. Pruitt, *Defendant-Appellant*; and

Maureen C. Pruitt, *Plaintiff-Appellee*

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup.Ct.R. 29.6

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari be issued to review the dismissal of Petitioner's Appeals to the Supreme Court of the State Ohio. The Judgment of the Trial Court, affirmed by the Eighth District Court of Appeals, Cuyahoga County, Ohio, is in conflict with federal law, poses significant injury to the federal statutory scheme with respect to Social Security benefits and this issue affects a substantial number of divorcing parties throughout United States. The Judgment of the Trial Court in ordering support in conflict with federal statutes, the enforcement of that order through contempt proceedings and the forfeiture of the Petitioner's residence likewise conflict with federal statutes, pose a substantial threat to the federal statutory scheme, which limits garnishment of wages, and violates the Petitioner's right to due process of law.

These issues potentially affect every termination of marriage and therefore are of significant interest throughout the States. State Courts have issued, and continue to issue, conflicting rulings, and it is in the interest of the federal statutory scheme that this Court review and address the issues presented herein.

OPINIONS BELOW

The opinion and order of the Eight District Court of Appeals, Cuyahoga County, Ohio, is unpublished, but is Appendix "E" hereto.

JURISDICTION

The Judgments of the Supreme Court of the State of Ohio were entered on January 25, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the U.S. Constitution and Article VI of the U.S. Constitution, The Supremacy Clause

Section 407, Assignment of Benefits, of Subchapter 2 - Federal Old Age and Survivors and Disability Benefits. 42. U.S.C. 407

Section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. 1673 (b) and (c).

STATEMENT OF THE CASE AND BACKGROUND FACTS

This domestic litigation commenced in 2001 when the Appellee asked Appellant for a divorce. The hearing on the matter was conducted throughout the summer and fall of 2003, and a Judgment Entry was entered on February 12, 2004. See Appendix A. The Judgment Entry was amended *Nunc Pro Tunc* on February 23, 2004 to correct clerical errors. See Appendix "B".

The Appellant has a Bachelor's Degree and is a certified public accountant. Appellee has a Master's Degree in accounting, has an undergraduate degree in Spanish, has, or will soon have, a Master's Degree in accounting and has at least two (2) Teaching Certificates.

Pursuant to the Judgment Entry the Appellant was ordered to pay $7,532.46 of support to the Appellee per month, which was over 74% of his disposable income from his wages and to pay other

support amounts indirectly on Appellee's behalf. Appellant's employee withheld and paid to the support agency only 60% of the Appellant's disposable income in accordance with federal garnishment limitations, but in conflict with the Judgment Entry. Because Appellant was, from time to time, unable to pay the full amount of support due, Appellee filed a Motion to Show Cause. Eventually a contempt hearing was conducted, and a finding of contempt was entered by the Trial Court.

In its Judgment Entry, the Trial Court also divided the parties' future Social Security benefits and offset other marital property against Appellant's higher, hypothetical, Social Security benefits, resulting in the payment of current dollars to the Appellee for such benefits.

The Appellant filed his Appeal with respect to the Judgment Entry of Divorce dated February 12, 2004. The Eighth District Court of Appeals for Cuyahoga County issued its Journal Entry and Opinion on August 25, 2005. The Appellate Court affirmed the Trial Court in most respects, including the division of the parties' Social Security benefits, but reversed it with respect to the amount of child

support. See Appendix "E".

The Appellant also filed his Appeal of the Judgment of Contempt but the Court of Appeals, sua sponte, dismissed the Appeal citing *In Re Ralph Watts* (Jan. 31, 2002), Cuyahoga Appeals No. 78713, 78991. See Appendix "D". Appellant filed a Motion for Reconsideration but it was denied by the Court of Appeals as well. See Appendix "F".

The Appellant petitioned the Supreme Court of Ohio with respect to both the Eighth District Memorandum and Opinion of Order of August 25, 2005 and the Dismissal of the Appellant's appeal of the Finding of Contempt. On July 25, 2005, the Supreme Court of Ohio denied both Petitions as not involving any substantial constitutional question. See Appendices "G" and "H".

The record below reflects: that the Trial Court's Judgment Entry dramatically favored the Appellee in both the division of marital property and support; that the Trial Court eventually awarded the Appellee substantially all of the parties' assets; the Trial Court's prejudice toward Appellant and his employer, Ernst & Young; and that the Trial Court in chambers called Appellant a "liar" and invited

his counsel to file an Affidavit of Disqualification with the Supreme Court of Ohio.

With regard to the finding of contempt, the hearing on the matter was originally scheduled for October 25, 2004. It was continued numerous times. The hearing commenced originally on May 16, 2005 and was continued until June 28, 2005. Appellant remarried on Feb. 26, 2005 and sought new employment with Ernst & Young outside of the United States so that he could reside with his new wife in Australia. He was scheduled to report for work on July 1, 2005.

At the hearing on June 28, 2005, the evidence showed the arrearage to be $8,776, slightly more than one month of his combined spousal and child support obligation. The Court, however, never made a specific finding regarding the arrearage. Prior to the finding of Contempt, the Trial Court had called Sheriff's Deputies into his Courtroom and announced that the Appellant had to either **surrender his passport, quit-claim his residence to the Appellee or be jailed for thirty (30) days**, all off the record. The Appellant then offered to pay the Appellee the amount of $14,500, well in

excess of the actual arrearage due, which she accepted as a cure and as a purge of the Appellant's alleged contempt. Appellant actually wrote a check to the Appellee and handed the check to his counsel for delivery to the Appellee. When the Trial Court was advised by counsel of the Appellant's purge, the Trial Court refused to permit Appellant to do so and instead repeated his order, once again off the record. The Appellant then involuntarily quit-claimed his residence to the Appellee in order to avoid being jailed so that he could leave for Australia to commence his new employment and to reside with his new wife. Subsequently, the Trial Court entered the finding of contempt and indicated in its order that the Appellant had purged his contempt by the conveyance of his residence to the Appellee. See Appendix "C".

Had the Court of Appeals Decision of August 25, 2005 been issued prior to the June 28, 2005 contempt hearing, there would have been no arrearage.

I. REASONS FOR GRANTING THE WRIT-ISSUE NO. 1.

Section 407, Assignment of Benefits, of Subchapter 2 - Federal Old Age, Survivors and Disability Insured Benefits, 42 U.S.C. 407, provides in pertinent part as follows:

> (A) In General. The right of any person to any future payments under this subchapter shall not be transferable or assignable, at law or in equity, and none of the monies paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Noteworthy in the statutory language is the fact that the restrictions are applicable to "any" future payments, which includes both an individual's payments and those provided for a spouse or a divorced spouse. Also noteworthy is that the restriction applies to transfers **or assignments** which are made either at law or in equity. A domestic relations court is a court of equity.

In the trial of this matter before the State Domestic Relations Court, no less than four (4) valuation experts dedicated nearly eight (8) full trial days to place a present value on the parties' future Social Security benefits for the purpose of dividing the assets – all over the repeated objections of counsel for this Appellant. The Trial Court

ultimately accepted the Appellee's expert's valuation and specifically included them as marital property. See Appendix "A" hereto, Judgment Entry. The Trial Court separately listed the valuation of the parties' Social Security benefits as marital property and allocated the values to each of them. Appellant was allocated a higher valuation and was ordered to pay the Appellee current dollars as a result of the difference. While there are a number of ways to characterize what the Trial Court has done, effectively Appellant in this instance was ordered to prepay hypothetical and speculative Social Security benefits to the Appellee.

A partial explanation of Social Security benefits is set forth in *Taylor v. Director, OWCP.*, 967 F.2d 961 (4th Cir. 1992), which cited *Director,* OWCP v. Ball, 826 F.2d 603 (7th Cir. 1987), as follows:

> The funds available for payment of social security benefits are generated from an excise tax on employers, 26 U.S.C. §3111(a) (1982), as well as from an income tax on individual wage earners, 26 U.S.C. § 3101(a) (1982). A recipient of Social Security benefits has no substantive right to a certain amount of benefits based on the amount contributed to the fund by employer and employee; rather, the recipient's amount of benefits is controlled by operation of law under 42 U.S.C. §402 (1982), a

> separate statutory scheme. *Cf. Heckler v. Mathews,* [465 U.S. 728, 737, 104 S.Ct. 1387, 1394, 79 L.Ed.2d 646 (1984)]. As a result, "eligibility for [social security] benefits, and the amount of such benefits, does not in any true sense depend on contribution to the program through the payment of taxes," which are levied on employer and employee alike. *Flemming v. Nestor,* [363 U.S. 603, 609, 80 S.Ct. 1367, 1371-72, 4 L.Ed.2d 1435 (1960)]. None of the criteria listed in the payment scheme mentions the amount contributed by the employer or employee. Moreover, Congress at any time could legislatively alter or abolish altogether contributions of employers and employees.

Id. at 607, 80 S.Ct. at 1370-71. Similar reasoning was employed by the court in *Director, OWCP v. Hill*, 831 F.2d 635 (6th Cir. 1987) (per curiam):

> **Social security is not operated like an annuity. Those who contribute to it are not entitled to a sum certain in return. There is no guarantee that one who has paid into the fund will ever receive anything from the fund. Once money is paid into the fund, any connection between the money and the contributor is broken.** The money becomes the property of the federal government, which is then responsible for making payments to eligible recipients in accordance with statutory standards.

Id. at 639 (following Ball in consolidated cases of a surviving divorced wife and a divorced wife). See also *Director, OWCP v. Logan*, 868 F.2d 285 (8th Cir. 1989) (per curiam) (following *Ball* in case of surviving divorced wife). **(emphasis added)**

Taylor v. Director, OWCP., 967 F.2d 961, 963-964 (4th Cir. 1992). The Court in *Taylor*, which was addressing the Black Lung Benefits Act of 1969, then went on to conclude that once contributions are made to the Social Security Pension Fund by an employee, that employee retains no property right in the money paid. Hence, any entitlement of a divorced spouse to those benefits is not provided from the contributor's property. Furthermore, the *Taylor* Court concluded that Congress can at any time legislatively alter or abolish altogether the Social Security benefit programs. *Taylor* at 964 citing *Director, OWCP v. Ball*, 826 F.2d 603, 607.

In addition to the foregoing, entitlement to benefits is subject to certain limitations and uncertainties that cannot be predicted. This was the case with respect to the Pruitts since normal retirement was at least fourteen (14) years away at the date of the divorce. These limitations and/or uncertainties include, but are not limited to, (1) changes to Social Security laws, (2) inadequacy of funding in the future, (3) future employment within the Social Security system (Appellant now works abroad), (4) death of one or both spouses, (5) remarriage, (6) salaries and benefits, and (7) longevity of the parties.

Indeed, notices from the Social Security Administration to participants now warn that the fund may not be adequate to pay future benefits, unless changes occur.

The Supreme Court of Ohio addressed this issue in *Neville v. Neville*, 99 O.St.3d 275 (2003), and held as follows:

> "...For the reasons that follow, we hold that a trial court, in seeking to make an equitable distribution of marital property, may consider the parties' future social security benefits in relation to all marital assets. Accordingly, we reverse the decision of the Court of Appeals."

Neville at 277. The *Neville* Court specifically reviewed and cited the holdings in this Court, including *Hisquierdo v. Hisquierdo* (1979), 439 U.S. 572 (railroad retirement benefits); *McCarty v. McCarty* (1981), 453 U.S. 210 (military retirement pay); *Mansell v. Mansell* (1989), 490 U.S. 581 (military disability benefits), concluding that federal law preempts state law that would allow a distribution of federal retirement benefits.

Since the *Neville* Decision, two other review courts in the State of Ohio have cited and followed *Neville*. In *Waller v. Waller*, 163 Ohio App.3d 303 (2005), the Seventh District Court of Appeals

of Ohio concluded that the Trial Court's consideration to the parties' Social Security benefits was reasonable. *Waller* at 313.

A second case illustrating the status of the law on this issue in the State of Ohio is *Hurte v. Hurte*, 164 Ohio App.3d 446 (2005), which was decided by the Fourth District Court of Appeals of Ohio on November 2, 2005. In *Hurte*, the appellant-wife complained that the trial court improperly exempted the husband's Social Security benefits from the marital estate and that she received no "offset" for that portion of her pension benefits. The Court of Appeals in *Hurte* remanded the Social Security issue to the trial court. *Id.* at 454. *Hurte*, just as the present case does, highlights the conflict between federal law and the State of Ohio's treatment of Social Security benefits. Specifically, the *Hurte* Court characterized the wife's SERS pension as an actual marital asset and characterized the husband's Social Security benefits as "hypothetical". The *Hurte* Court also "...recognized the resulting inequity and devised the **hypothetical Social Security offset**...". *Id.* at 452 citing *Walker v. Walker* (1996), 112 Ohio App.3d 90 **(emphasis added)**.

This issue and the treatment by other state courts is widely diverse and frequently in conflict with federal law. See, *Pleasant v. Pleasant,* 97 Md. App. 711 (1997); citing *Taylor v. Director, OWCP.*, 967 F.2d 961 (4th Cir. 1992), *Olson v. Olson*, 445 N.W.2d 1 (N.D. 1989); *Deering v. Deering*, 292 Md. 115 (1981), as an example of a holding by a state court which does not conflict with federal law.

This Court has addressed similar issues on four prior occasions in *Hisquierdo v. Hisquierdo* (1979), 439 U.S. 572, (on certiorari to the Supreme Court of California); *McCarty v. McCarty* (1981), 453 U.S. 210 (on certiorari to the First Appellate District Court of California); *Mansell v. Mansell* (1989), 490 U.S. 581 (on certiorari to the Fifth Appellate District Court of California); and in, *Rose v. Rose*, 481 U.S. 619 (1987) (on appeal from the Court of Appeals of Tennessee). However, to this petitioner's knowledge, the issue presented in the instant case, i.e., the division of Social Security benefits as marital property, has never been directly reviewed or addressed by this Court.

Hisquierdo, supra, involved the Railroad Retirement Act of 1974, which can be altered by Congress at any time, but benefits for an employee's spouse terminate upon divorce, unlike Social Security benefits. 45 U.S.C. §231c(3). Section 231(m) of the Railroad Retirement Act is very similar to 42 U.S.C. 407 insofar as:

> [n]o annuity [under the Act] shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

45 U.S.C. §231(m). In *Hisquierdo*, supra, the Supreme Court of California held that, because the petitioner's employment was during marriage, the Railroad Retirement benefits that were accumulated were community property. It further held that Section 231(m) applied only to creditors and not to a divorcing spouse. This Court held that (i) an offsetting award for the expected value of respondent's interest in petitioner's statutory Railroad Retirement benefits would defeat the purpose of Section 231(m) of the Act and (ii) ordering the petitioner to pay his divorced spouse the monetary equivalent of a portion of his benefits under the Act would likewise contravene Section 231(m) of the Act.

In *Hisquierdo*, the Supreme Court noted that, on at least four (4) prior occasions, it had to intervene in order to forestall injury to federal rights by virtue of state community property law concepts. *Hisquierdo*, supra; citing *McCune v. Essig*, 199 U.S. 382 (1905); *Yiatchos v. Yiatchos*, 376 U.S. 306, (1964); *Free v. Bland*, 369 U.S. 663 (1962); and *Wissner v. Wissner*, 338 U.S. 655 (1950). The importance of Section 231(m) of the Act is that it intends to ensure that the benefits actually reach the beneficiary and it preempts state law that stands in its way. *Hisquierdo* at 584, citing *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973); and *Wissner v. Wissner*, supra.

In the State of Ohio an "offsetting award" is now specifically permitted. *Hurte v. Hurte*, supra. But an "offsetting award" conflicts with *Hisquierdo*, where this Court held that an "offsetting award" would be an improper anticipation of payment by allowing a spouse to receive an interest before the date that Congress set for an interest to accrue and be paid. *Hisquierdo* at 590. This Court concluded in *Hisquierdo* that:

> [a]ny such anticipation threatens harm to the employee, and corresponding frustration to federal policy, over and above

> the mere loss of wealth caused by the offset. If, for example a nonemployee spouse receives offsetting property, and then the employee spouse dies before collecting any benefits, the employee's heirs or beneficiaries suffer to the extent that the offset exceeds the lump-sum death benefit the Act provides.

Hisquierdo at 589. This petitioner argued before the Trial Court, the Eighth District Court of Appeals and the Supreme Court of Ohio that there are a number of circumstances where he may never receive the benefits for which he was charged in the division of property. And, in fact, although it is not part of the record below, the latter scenario has actually occurred here. As of June 2005, the Appellant no longer participates in the Social Security system. Likewise, there are a number of circumstances where his divorced spouse may never receive the hypothetical benefits for which she was credited in the division of property. For example, she may remarry. She may die. She may earn adequate state retirement benefits to substantially reduce or offset her Social Security benefits attributed to her in the division of the marital estate.

In *McCarty v. McCarty* (1981), 453 U.S. 210, this Court addressed the question of whether military retirement pay benefits were subject to a division as quasi community property and held that

military retirement pay is a personal entitlement of the retiree, and the application of community property principles to military retirement pay threatens grave harm to a clear and substantial federal interest. In *McCarty*, this Court further determined that "state family and family property law must do 'major damage' to a 'clear and substantial' federal interest before the Supremacy Clause will demand that state law be overridden". *McCarty* at 220; quoting from *Hisquierdo*, supra at 581. In *McCarty*, the Supreme Court concluded that there was indeed a conflict between the terms of the federal retirement statutes pursuant to the Military Retirement Pay Act and the community property right asserted by the appellee in *McCarty*. See the discussions by this Court in *McCarty* at 234-235; citing *Free v. Bland*, 369 U.S. 663 (1962). This court also held that Congress has weighed this matter and it is not the province of state courts to strike a balance different from the one Congress has struck. *McCarty* at 236 citing *Hisquierdo* at 590.

Mansell v. Mansell (1989), 490 U.S. 581, was also on appeal from the Court of Appeals of California, Fifth Appellate District. The Opinion stated that, "...we decide whether state courts...may

treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits". *Mansell* at 583. Justice Marshall concluded in *Mansell* that, under the Act's plain and precise language, state courts have been granted the authority to treat disposable retirement pay as community property, but they have not been granted the authority to treat total retired pay as community property. *Mansell* at 589. Noteworthy is Fn. 2 at Page 584 of *Mansell*, where the Supreme Court stated that the language of the act covers both community property and equitable distribution states. Ohio is an equitable distribution state, but its domestic relations laws are substantially similar to those in community property states.

Finally, it is especially important that Congress has outlined the rights of divorced spouses to Social Security benefits with great particularity. See 42 U.S.C.A. 416(d)(1), et seq. and 42 U.S.C.A. 402 (b), et seq. Given the specificity of Congressional treatment of a divorced spouse's rights to Social Security benefits, it is an egregious affront to the federal statutory scheme when a state court divides parties' Social Security benefits as marital property.

II. REASONS FOR GRANTING THE WRIT-ISSUE NO. 2.

Section 303(b) of the Consumer Credit Protection Act provides restrictions on the amount that may be withheld for support of a person as follows:

> (A) Where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is issued), 50 per centum of such individual's disposable earnings for that week; and
>
> (B) Where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week; except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve week period which ends with the beginning of such workweek.

15 U.S.C. §1673(b)(2)(A) and (B). Furthermore, no court of any state and no state agency may make, execute or enforce any order or process in violation of Section 1673. 15 U.S.C. 1673(c).

When Congress enacted the Consumer Credit Protection Act in July 1970, it made findings outlining (i) the purpose of restrictions on garnishments, (ii) the disadvantages of garnishments, (iii) the

necessity of regulation and (iv) the necessary prohibitions relating to garnishment. Furthermore, Congress realized that the restrictions had to apply to the courts of United States and the States because it would be the courts giving effect to the execution and enforcement of garnishment orders. 15 U.S.C. §1671.

To the Petitioner's knowledge, this Court (i.e., the Supreme Court of the United States) has never addressed this issue, i.e., a violation of the garnishment limitations arising out of a domestic relations court's support order.

In the case of Pruitt, the Trial Court ordered the Appellant to pay the amount of $7,532.46 per month of combined child and spousal support secured by means of a support withholding or deduction notice to obligor's income source. (emphasis added). See Appendix A. The award amounted to seventy-four percent (74%) of the Appellant's disposable earnings. In conflict with the Judgment Entry, Appellant's employer, Ernst & Young, limited its garnishment withholding to the federal limitation, i.e., sixty percent (60%) of the Appellant's disposable earnings.

The Trial Court's imposition of a draconian coercive penalty - i.e., the forfeiture of the Appellant's residence with an estimated net value of $100,000 - constitutes a violation of the Appellant's right to due process of law. The only issue before the Court on June 28, 2005 was the alleged arrearage in support. The evidence introduced by Appellant reflected that the arrearage was $8,776. It is impossible to know the actual arrearage due because the Trial Court never made that determination in its Judgment Entry. Thus, the Trial Court's purge order was both arbitrary and irrational and should shock the conscience of this Court. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, (1972); *Matthews v. Eldridge*, 424 U.S. 319, (1976); *Independent Enterprises v. Pittsburgh*, 103 F.3d 1165, 1177 (3rd Cir. 1997); See also, *Swales v. Township of Ravenna*, 989 F.Supp. 925 (N.D. Ohio 1997); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). "Substantive due process" requires in addition that decision-makers not act in a manner which is "wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282, (1980). Indeed, the timing of the Trial Court's jail threat was itself a violation of Appellant's due process rights inasmuch as Pruitt had no

meaningful notice that he might be immediately incarcerated or deprived of important property interests without any reasonable opportunity to purge a contempt. *Terrace Knolls, Inc. v. Dalton, Dalton, Little & Newport, Inc.*, (N.D. Ohio 1983), 571 F.Supp. 1086, affirmed, 751 F.2d 387; *Boals v. Gray*, 577 F.Supp. 288 (N.D. Ohio 1997).

Approximately two months after the forfeiture of the Appellant's residence, i.e., on August 25, 2005, the Court of Appeals set aside, in part, the Support Order so that the disputed arrearage would not have existed had the Court of Appeals ruling been issued at the time of the Show Cause hearing before the Trial Court. See Appendix "E".

The State of Ohio has adopted the express language of the "ceiling" imposed by Section 1673(b), Title 15 U.S. Code, for withholding against wages. See Ohio Revised Code 3113.21. While this issue has been reviewed from time to time by Appellate Courts in the State of Ohio, it has never been addressed by the Supreme Court of Ohio.

In his briefs, the Appellant relied upon the holding in *Hockenberry v. Hockenberry*, 75 Ohio App.3d 806 (1992), 600 N.E. 2d 839. In *Hockenberry*, the trial court had imposed a withholding order for child support exceeding 60% of the husband's disposable earnings and a withholding order for child support arrearages in excess of 65% of the husband's disposable earnings. Because the husband had no other sources of income from which to pay the support order, the Henry County, Ohio Court of Appeals reversed the trial court, finding that, where there was no other source of income to pay a support order, an order in excess of the 60% limitation violated the Consumer Credit Protection Act. 15 U.S.C. §1673(b). This is exactly the case of Pruitt. The Appellant here has no other source of income from which to pay that part of the support order which exceeds the withholding limitation.

Other Ohio Courts have found that wage withholding orders in excess of the withholding limits imposed by R.C. 3113.21(D) and 15 U.S.C. §1673(b) to be erroneous, these Courts have distinguished these cases by also holding that these statutory withholding limits do not impose limitations on a trial court's ability to order support in

excess of those limits, but only restricts the trial court's ability to order wage withholdings beyond those limits. See, e.g., *Arthur v. Arthur*, 130 Ohio App.3d 398 (1998); *Fasano v. Fasano*, Unreported, Eighth District Court of Appeals, Cuyahoga County, Ohio, No. 74040 (May 6, 1999).

Only a limited number of Federal Courts have addressed the issues that we confront in this case. In *Marshall v. Dist. Court for Forty-First-b Jud. Dist.* (E.D. Mich. 1978), 444 F.Supp. 1110, the Court addressed the priority of exempt versus nonexempt garnishment orders under the Consumer Credit Protection Act. *Id.* at 1116. What is important, however, from *Marshall* is that the District Court invoked the Supremacy Clause stating:

> 36. Under the supremacy clause in Article VI of the federal Constitution, federal law, when within the scope of the powers delegated to the federal government by the federal Constitution, takes precedence over State law; and State courts, just as much as the federal courts, must follow and give precedence to such federal law, especially where the law includes a command expressly running to such courts, as is true under section 303(c) of the Act.

Marshall at 1116. In *Long Island Trust Co. v. U.S. Postal Service*, 647 F.2d 336, (2d Cir. 1981), the appellant had argued that the

purpose of the Consumer Credit Protection Act was primarily for the protection of creditors. The Second Circuit Court of Appeals summarily rejected that argument. *Id.* at 339. The Second Circuit in *Long Island* went on to discuss the background of the Act, its purposes and the intent of Congress, stating that Congress acted not to protect the rights of creditors but to limit the ills that flowed from the unrestricted garnishment of wages, the burgeoning number of personal bankruptcies and the undue burden on interstate commerce. *Id.* at 339, citing H.R. Rep. No. 1040, 90th Cong., 2d Sess. (1968), *reprinted in* 2 (1968) U.S. Code Cong. & Ad. News 1962, 1979. Furthermore, the Second Circuit pointed out that the Act specifically intended to limit the garnishment of wages for child support and alimony. *Id.* at 341. Hence, the purpose of the Act plainly invokes interstate commerce and protection of debtors (not creditors), including individuals subject to domestic child and spousal support orders.

Appellant filed his Notice of Appeal of the finding of contempt and the forfeiture of his home to the Eighth District Court of Appeals. However, the Court of Appeals *sua sponte* dismissed

the Appeal citing *In Re: Ralph Watts* (Jan. 31, 2002), Cuyahoga Appeals No. 78713, 78991. *In Re: Watts* stated that:

> Where a **criminal defendant has been convicted of a misdemeanor** and has **voluntarily** satisfied his or her judgment for that offense, an appeal from the conviction is moot unless the defendant **has offered evidence from which an inference can be drawn** that he or she will suffer some **collateral legal disability** or **loss of civil rights**. ***(emphasis added)***

In Re: Watts cited *State v. Golston* (1994), 71 Ohio St.3d 224, which cited *State v. Wilson* (1975), 41 Ohio St.2d 236, 325 N.E.2d 236 and *State v. Berdnt* (1987), 29 Ohio St.3d 3, 504 N.E.2d 712, all criminal cases. The evidence in *Watts* showed that Watts had been held in contempt on three (3) separate occasions for violating the standing orders. The offense was a misdemeanor because imprisonment in excess of one (1) year could not be imposed pursuant to O.R.C. 2901.02. Furthermore, Mr. Watts failed to present any evidence from which an inference could be drawn that he would suffer some collateral legal disability or loss of Civil Rights.

The circumstances of this Appellant are completely distinguishable from those in *In Re: Watts*. Pruitt did not voluntarily quit claim the deed to his residence. Pruitt was not convicted of a

misdemeanor. Pruitt's contempt proceeding was civil in nature and not a criminal proceeding. And, finally, Pruitt has suffered a collateral legal disability or loss of Civil Rights.

In *Dombroski v. Dombroski*, Unreported, (September 28, 1999) Seventh District Court of Appeals, Harrison County, Ohio App.No.506, the Court notably distinguished criminal and civil contempt, but it went much further and stated that the trial court essentially modified its division of property by ordering property to be sold and the proceeds to be divided equally between the parties. The Court stated:

> This sanction effectively modifies the distribution of property made under the divorce decree. Given the general rule that the property division may not be subsequently modified, this raises the question of whether the trial court had the jurisdiction or authority to do so in this case. *Id.* at 5 of 12.

This is similar to what happened in the instant case. The Trial Court modified the division of property set forth in the Judgment Entry of Divorce through the vehicle of the contempt proceeding. The Appellant was unaware and had no notice that his residence could be forfeited or that the Trial Court could further divide the marital

property. He was only on notice of the alleged support arrearage, which he disputed.

The most noteworthy Ohio case relevant to this argument is *In Re: Contempt of Morris* (1996), 110 Ohio App.3d 475, decided in the Eighth District Court of Appeals, Cuyahoga County, on April 22, 1996. In *Morris*, an attorney was representing a criminal defendant in a sentencing hearing. *Morris* attempted to object to testimony by the victim's mother, who was giving an impact statement. The *Morris* Trial Court stated from the bench:

> You are in contempt of court. Your fine, at this point is $250. Have a seat. If you rise again, the next fine will be $500; if you rise again, the next fine will be $750; if you rise again, it is going to $1,000 and six months incarceration.

Later in the hearing, Attorney Morris was given the opportunity to address the trial court regarding the contempt. However, "[w]hen the appellant attempted to explain why he objected to the victim impact statement, the trial court stated that appellant wished [sic] to purge himself of the contempt and told appellant to pay the $250 fine before he left the court". *In Re Morris* at 478. The Court of Appeals confronted the issue directly and stated that:

> Appellant was ordered by the trial court to pay his fine before he left the courtroom. Appellant was not given a choice of whether to complete his obligation to the trial court through payment of the fine. Compliance with such a directive is **not a voluntary** payment of a fine. The doctrine of mootness will be applied only where a defendant has **voluntarily** paid the fine. ***(emphasis added)***.

The Court of Appeals then denied the State's motion to dismiss the appeal. *In Re Morris* at 479.

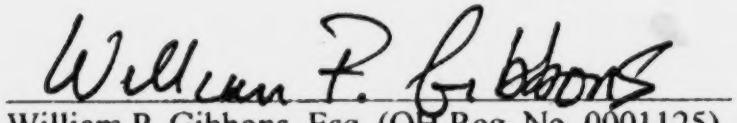
The foregoing reflects circumstances similar to those that were present at the conclusion of the June 28, 2005 contempt hearing for Appellant. Appellant attempted to pay the amount of $14,500 to his former spouse in order to purge any finding of contempt. The Court however refused to accept that purge or payment and instead repeated that Pruitt either surrender his passport, quitclaim his interest in his residence or be immediately jailed for thirty days. Because of his obligation to report for work on July 1, 2005 in Australia, to protect his reputation as a certified public accountant and in order to live with his new wife, Appellant was forced to quitclaim his residence to the Appellee. To prohibit Appellant from raising the issue of the irregularity of his contempt sanction on appeal under these circumstances is manifestly unjust and deprives

him of his property and civil rights without due process under the Fourteenth Amendment to the U.S. Constitution.

Appellant was denied substantive and procedural due process of law (i) by virtue of the Trial Court's excessive support order in violation of Section 303(b) of the Consumer Credit Protection Act inasmuch as the Appellant has no other sources of income to pay such support order other than his wages, (ii) because Appellant had no notice that his home could be forfeitued, (iii) by the forfeiture of Appellant's home, which was arbitrary, irrational and shocking, and (iv) the denial of Appellant's right to appeal the finding of contempt and the forfeiture of his residence.

For all of the foregoing reasons, this petition should be granted as to both Issues.

Respectfully submitted,



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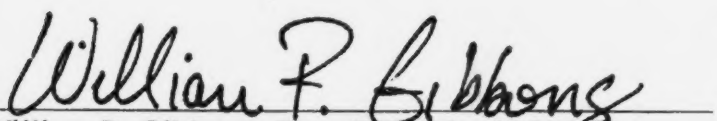
PROOF OF SERVICE

I certify that a copy of this Petition for a Writ of Certiorari was sent by ordinary U.S. Mail, postage prepaid, to counsel for the Plaintiff-Appellee, Deborah Akers-Parry, Esq., Wolf & Akers, 1515 East Ohio Building, 1717 East 9th Street, Cleveland, Ohio 44114, this 25th day of April 2006.



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Supreme Court, U.S.
FILED
051455 APR 25 2006
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

GARY K. PRUITT, *Petitioner*
v.
MAUREEN C. PRUITT, *Respondent*

On Petition for a Writ of Certiorari to the
Supreme Court of Ohio

APPENDICES "A" THROUGH "H" TO
Petition for a Writ of Certiorari

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Counsel for Petitioners

April 25, 2006

Appendices

Appendix A ..... Judgment Entry of Trial Court Case No. D282858, Entered February 12, 2004

Appendix B ..... Judgment Entry *Nunc Pro Tunc* of Trial Court, Case No. 282858, Entered February 23, 2004

Appendix C ..... Judgment Entry of Contempt of Trial Court, Case D282858, dated June 28, 2005

Appendix D ..... Court of Appeals of Ohio, Eighth Appellate District, *Sua Sponte* Dismissal of Appeal, dated August 1, 2005

Appendix E ..... Journal Entry and Opinion of Court of Appeals of Ohio, Eighth District, dated August 25, 2005

Appendix F ..... Journal Entry of Court of Appeals of Ohio, Eighth District, *Sua Sponte* Dismissal of Appeal as Moot, September 19, 2005

Appendix G ..... Supreme Court of Ohio Entry Denying Jurisdiction, Case No. 05-1968 (Show Cause Appeal), January 25, 2006

Appendix H ..... Supreme Court of Ohio Entry Denying Jurisdiction, Case No. 05-1971 (Main Appeal), January 25, 2006

[THE FOREGOING DOCUMENTS HAVE BEEN REPRODUCED, IN PART, FOR PURPOSES OF SUBMITTAL TO THE U.S. SUPREME COURT]

IN THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
CUYAHOGA COUNTY, OHIO

MAUREEN C. PRUITT	)CASE NO. D282858
	)
PLAINTIFF,	)JUDGE JAMES P. CELEBREZZE
	)
VS.	) **JUDGMENT ENTRY**
	)
GARY K. PRUITT, et al.	)
	)
DEFENDANTS.	)

This cause came on for hearing before the Honorable James P. Celebrezze upon the Complaint of the Plaintiff, the Answer and Counterclaim of the Defendant and the evidence.

Upon due consideration thereof, the Court finds Plaintiff was a resident of the State of Ohio for more than six (6) months and a bona fide resident of Cuyahoga County for more than ninety (90) days, both immediately preceding the filing of the Complaint; the parties were married as alleged; and three children were born as issue of the marriage, to wit: Miranda Pruitt (D.O.B. 09-27-1987), Alexis Pruitt (D.O.B. 03-23-1990) and Michael Pruitt (D.O.B. 12-28-1993).

The Court further finds Plaintiff and Defendant have established the cause of incompatibility and that by reason thereof both Plaintiff and Defendant are entitled to a divorce.

The Court further finds that the marriage is from June 17, 1978 to July 7, 2003, the first day of trial.

Allocation of Parental Rights and Responsibilities

[THIS DOCUMENT HAS BEEN REPRODUCED FOR PURPOSES OF SUBMITTAL TO THE U.S. SUPREME COURT]

The Court further finds that a motion requesting shared parenting was filed by at least one parent.

The Court further finds that the parents have agreed to shared parenting and have jointly submitted a plan filed at least 30 days prior to hearing which plan the Court, at this time and subject to further monitoring by this Court, finds in the best interest of the children.

The Court further finds that the issue of allocation of parental rights and responsibilities should be reviewed by this Court one year from the date of the journalization of this judgment entry which specific date and time shall be set at the convenience of this Court.

The Court further finds that the parties and the minor children should attend counseling with a licensed psychologist until further order of this Court.

Property

The Court further finds that all of the parties' property was acquired during the marriage.

The Court further finds by clear and convincing evidence that Plaintiff's Jewelry were gifts to her only and therefore are her separate property.

The Court further finds that Defendant's inheritance from his mother was commingled with other marital assets, Defendant has failed to properly trace the amount and therefore the $14,097.00 in the National City Bank account is marital property.

The Court further finds that all other property owned by the parties is marital property.

The Court further finds that Defendant withdrew $54,000.00 from the Discover account.

The Court further finds that Plaintiff withdrew $51,270.00 from the Discover account.

The Court further finds that Plaintiff withdrew $10,000.00 from the My Bank account.

The Court further finds that Plaintiff withdrew $948.00 from the National City Bank account.

The Court further finds that Plaintiff withdrew $38,421.00 from the Ameritrade account.

The Court further finds that Plaintiff received the parties' $49.00 refund from Discover.

The Court further finds that the parties have an account at My Bank with a balance of $1,588.00.

The Court further finds that the parties have an account at Huntington National Bank with a balance of $136,904.00.

The Court further finds that the parties have an account at US Bank with a balance of $21,285.00.

The Court further finds that the value of the Marital Residence located at 8457 Timber Trail, Brecksville, Ohio is $350,000.00 and the equity in the residence is $126,787.00.

The Court further finds that the parties have other real property titled to Plaintiff located at 8653 Hollis Lane, Brecksville, Ohio valued at $275,000.00 at the time of purchase.

The Court further finds that the parties own four vehicles:

2002 Chevrolet Van with negative equity of $1,514.00

2003 Chevrolet Van with equity of $2,225.00

1987 Pontiac with value of $875.00

1989 Chevrolet Van with value of $2,375.00

The Court further finds that the parties' have a grand piano the value of which was stipulated as $17,000.00.

The Court further finds that, as Plaintiff has purchased a replacement piano for the children to use, each party is entitled to $8,500.00, representing one half the value of the grand piano, as property division which shall be reflected in the overall division of property and debt pursuant to this judgment entry.

The Court further finds that the parties stipulated that each shall keep all other household furnishings and personal property currently in their respective possessions excluding photos and video tapes.

The Court further finds that Plaintiff has an interest in an IRA at Salomon Smith Barney with a balance of $44,378.00.

The Court further finds that Plaintiff has a Fidelity IRA with a balance of $6,850.00.

The Court further finds that Defendant has a Fidelity IRA with a balance of $6,858.00.

The Court further finds that Defendant has an Ernst & Young 401(k) plan with a balance of $214,717.00.

The Court further finds that Defendant has an Ernst & Young Defined Benefit Retirement Plan and that the parties have stipulated that the account not be valued and should be divided equally between Plaintiff and Defendant, whatever the value may be, by an appropriate Qualified Domestic Relations Order.

The Court further finds that Defendant has an Ernst & Young Supplemental Retirement Plan, which the parties agree is not a qualified plan.

The Court further finds that the parties have not had the Defendant's Supplemental Retirement Plan valued.

The Court further finds that, whatever the value of Defendant's Supplemental Retirement Plan may be, it should be divided equally between Plaintiff and Defendant.

The Court further finds that the value of Plaintiff's Social Security benefits is $44,300.00.

The Court further finds that the value of Defendant's Social Security benefits is $105,956.00.

The Court further finds that Plaintiff has an STRS Pension account opened in 2002 the value of which is nominal.

The Court further finds that the parties' have custodial accounts for the benefit of the children upon which both parties should be designated custodians with approval by both parties required for withdrawals.

The Court further finds that Plaintiff has a personal checking account at Third Federal Savings with a balance of $9,779.00.

The Court further finds that Defendant has a personal checking account at Huntington National Bank with a balance of $2,104.00.

The Court further finds that Plaintiff has an account at Ameritrade with a balance of $341.00.

The Court further finds that the parties have travel points of undetermined value that should be divided equally between the parties.

The Court further finds that the parties have an income tax capital loss carry forward with a balance of $16,052.54 on the basis of which each party is entitled to claim $3,000.00 per year.

The Court further finds that the parties stipulated that Defendant should retain the marital residence located at 8457 Timber Trail, Brecksville, Ohio.

The Court further finds that an equal division of the martial property is equitable in this matter.

Debts

The Court further finds that the martial debts include:

MBNA Visa $18,000.00

Discover $1,600.00

Chase Visa $19,950.00

GMAC Loan for 2002 Chevrolet Van $37,240.00

Loan for 2003 Chevrolet Van $39,734.00

GMAC loan secured by mortgage on Timber Trail Property $225,000.00

Mortgage amount agreed to by the parties for property located at 8457 Timber Trail $87,057.00.

Mortgage for property located at 8653 Hollis Lane $220,000.00.

Child and Spousal Support

In addition to considering all other relevant factors pursuant to Ohio Revised Code § 3105.18 and 3119, et seq., the Court further finds:

Plaintiff is enrolled in a masters degree program at Cleveland State University. Plaintiff earns $2,100.00 per

semester which is spent on books, supplies and transportation.

Plaintiff has a Master's Degree in Accounting but has not been employed as an accountant since 1987.

Plaintiff has been re-certified to teach Spanish and is seeking employment in this field.

Plaintiff's current earning ability teaching Spanish is $23,700.00 per year.

Plaintiff's total monthly expenses are $7,065.00.

Defendant's income is $177,109.33 per year.

Defendant's monthly expenses are $5,071.00.

The Court further finds pursuant to Ohio Revised Code section 3119.22 and considering the factors and criteria set forth in Ohio Revised Code section 3119.23, the amount of child support determined pursuant to the schedule would be unjust or inappropriate and would not be in the best interests of the minor children.

The Court further finds that the hourly, rate charged by Plaintiff's counsel is reasonable and appropriate, in terms of the amount customarily charged by attorneys with similar credentials in this area of Ohio.

The Court further finds that the time spent by Plaintiff's counsel to prepare for and litigate this matter is reasonable.

The Court further finds that much of Plaintiff's attorney fees were made necessary by Defendant's misconduct throughout the pendancy of this matter.

The Court further finds that Plaintiff would be prevented from fully litigating her interests in this matter absent an award of

attorney fees.

The Court further finds that Defendant has the ability to and should pay $50,000.00 of Plaintiff's attorney fees.

The Court further finds that Defendant has term life insurance coverage of $1,020,000.00 with Connecticut General Insurance Company.

The Court further finds that Defendant should continue to maintain the term life insurance with Connecticut General in that amount with Plaintiff designated a beneficiary in order to assure the payment of support.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff and Defendant are hereby granted a divorce from one another and that the marriage contract heretofore existing between the parties be and is hereby dissolved and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment Entry shall constitute an order for shared parenting pursuant to Ohio Revised Code §3109.04(A), (D) and (G) and the parties shall share the rights and responsibilities for the care of the children in accordance with the shared parenting plan which is hereby adopted, attached hereto as Exhibit A and incorporated herein by reference.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the issue of parental rights and responsibilities regarding the minor children shall be reviewed by this Court one year from the date of journalization of this judgment entry which date and time shall be scheduled at the convenience of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, Defendant and the minor children shall attend counseling with a licensed psychologist approved by this Court pursuant to a regimen of therapy recommended by the psychologist and approved by this Court until further order of this

Court.'

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each parent is to file a notice of intent to relocate if he or she intends to move to a residence other than the one specified in this order. Pursuant to the determination made under Ohio Revised Code §3109.051(G)(2) and subject to further order of this Court, the other parent shall be sent a copy of any notice of relocation filed with this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall' pay to Plaintiff the sum of $2,432.46 which sum includes 2% processing charge, per month for the support of the minor children ($810.82 per month per child). Said order shall continue until further order of this Court or until said children reach age 18 or so long as the children continuously attend, on a full-time basis, any recognized and accredited high school, however, no later than age 19. Attached hereto as Exhibit B is the worksheet used in computing the child support under Ohio Revised Code §3119.022 or 3119.023. In addition, Defendant shall pay to Plaintiff the sum of $5,100.00, which sum includes 2% processing charge, per month as spousal support, subject to death of either party or the remarriage of the spouse receiving spousal support, for a period of eight years from the date of journalization of this judgment entry.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court hereby reserves jurisdiction regarding the issue of spousal support.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the total amount of $7,532.46 per month, which sum includes 2% processing charge, shall be paid through the Ohio Child Support Payment Central (CSPC). Any payments not made through CSPC shall not be considered as payment of support. Said support shall be secured by means of a **support withholding or deduction notice to Obligor's income source.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Cuyahoga Support Enforcement Agency shall immediately issue a notice of mandatory wage attachment on Defendant's employer Ernst & Young, LLP located at 925 Euclid Avenue, Cleveland, Ohio 44115 in the amount of $7,532.46 per month.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all support under this order shall be withheld or deducted from the income or assets of the obligor pursuant to a withholding or deduction notice or appropriate order issued in accordance with Chapters 3119., 3121., 3123., and 3125. of the Revised Code or a withdrawal directive issued pursuant to sections 3123.24 to 3123.38 of the Revised Code and shall be forwarded to the obligee in accordance with Chapters 3119., 3121., 3123., and 3125. of the Revised Code.

The following group health insurance and health care policies, contracts, and plans are available at a reasonable cost to Obligor or Obligee (list name of insurer and to whom available):

Insurer:	Available to:
Medical Mutual of Ohio	Defendant (Obligor)

The Court finds that **Obligor** has health insurance available at a reasonable cost through a group health insurance or health care policy, contract or plan offered through **Obligor's** employer or through another group health insurance or health care policy, contract or plan. The health insurance coverage is not available at a more reasonable cost through a group health insurance or health care policy, contract or plan available to **Obligee.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that **Obligor** is ordered to obtain health insurance coverage through Ernst & Young, LLP, 925 Euclid Avenue, Cleveland, Ohio 44115, Medical Mutual of Ohio, P.O. Box 6018, Cleveland, Ohio 44101-10185, ID No. 267231408, Group No. 530836230.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that health insurance coverage be obtained for the following children and that the children be designated as covered dependents under any health insurance or health care policy, contract or plan:

Full Name of Each Child	Address	Date of Birth
Miranda K. Pruitt	8653 Hollis Lane Brecksville, Ohio 44141	09-27-1987
Alexis D. Pruitt	8653 Hollis Lane Brecksville, Ohio 44141	03-23-1990
Michael K. Pruitt	8653 Hollis Lane Brecksville, Ohio 44141	12-28-1993

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the party ordered to provide health insurance supply the other party with information regarding the benefits, limitations and exclusions of the health insurance coverage, copies of any insurance forms necessary to receive reimbursement, payment of other benefits under the health insurance coverage and a copy of any necessary insurance cards.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that **Obligor** pay the reasonable and ordinary uninsured and unreimbursed medical, dental, optical and prescription drug expenses for the minor children which are defined pursuant to Ohio Revised Code §3119.01(C)(4) as the first $100 per child per calendar year of the above expenses. Any remaining uninsured and/or unreimbursed medical, dental, optical and prescription drug expenses including co-payments and/or deductibles shall be paid by

both Obligor and Obligee in amounts equal to the percentages indicated on Line 16 of the Child Support Computation Worksheet.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the health insurer shall reimburse Plaintiff, Maureen C. Pruitt, 8653 Hollis Lane, Brecksville, Ohio 44141, (440)526-0909 for out-of-pocket medical, hospital, dental, optical or prescription expenses paid for the children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the person required to obtain health care

insurance coverage for the children subject to this child support order obtains new employment and the health insurance coverage for the children is provided through the previous employer, CSEA shall comply with the requirements of Ohio Revised Code §3119.43 and 3119.44 which may result in the issuance of a notice requiring the new employer to take whatever action is necessary to enroll the children in health care insurance coverage provided by the new employer.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that **Obligor** submit a copy of this order to the insurer at the time application is made to enroll the children and that **Obligor,** no later than 30 days after the issuance of this order, furnish written proof to CSEA that the foregoing orders have been satisfied.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that if the person required to obtain health insurance coverage pursuant to this order for the children fails to obtain health insurance coverage, CSEA shall comply with Ohio Revised Code §3119.40 and 3119.41 to obtain a court order requiring Obligor or Obligee to obtain health insurance coverage.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the insurer that provides the health insurance coverage for the children may continue making payments for medical, optical, hospital, dental or prescription services directly to any health care provider in accordance with the applicable health insurance or health care policy, contract or plan.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that any insurer that receives a copy of an order or notice issued under Ohio Revised Code §3 119.30, 3119.41 or 3119.44 shall comply with it in accordance with sections 3119.30 to 3119.58, regardless of the residence of the children.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the employer of the party required to obtain health insurance coverage is required to release to the other parent

or CSEA, upon written request, any necessary information regarding the health insurance coverage including, but not limited to, the name and address of the insurer and any policy, contract or plan number, and otherwise to comply with Ohio Revised Code §3113.217 and any Court order or notice described in these sections.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that any employer who receives a copy of an order issued under Ohio Revised Code §31 19.30, 3119.41 or 3119.44 shall notify the CSEA of any change in or the termination of Obligor's or Obligee's health insurance coverage that is maintained pursuant to the order or notice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Obligor immediately notify CSEA, in writing, of the commencement of or any change in employment (including self-employment), receipt of additional income/monies or termination of benefits. Obligor shall include a description of the nature of the employment/income source and the name, business address and telephone number of any employer/source of income. Obligor shall immediately notify the Cuyahoga Support Enforcement Agency (CSEA) of any change in the status of an account from which support is being deducted or the opening of an new account with any financial institution along with the name, business address and account number(s).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all parties comply with the request of Cuyahoga Support Enforcement Agency (CSEA) or the Court to provide information regarding his/her health insurance benefits, federal income tax return from the previous year, all pay stubs within the preceding six (6) months, all other records evidencing the receipt of any other salary, wages or compensation within the preceding six (6) months. Said records include, but are not limited to, proof of unemployment status, financial institution accounts and any benefits (i.e., unemployment, sub pay, sick leave, Workers Compensation, severance pay, retirement, disability, or annuities, Social Security and Veteran's Administration).

Either party's failure to provide any income/benefits information pursuant to this order, or failure to comply with the foregoing order of notification, shall be considered contempt of court, punishable by a fine and/or jail sentence. Attorney fees and court costs may then be assessed against the party held in contempt.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the residential parent and legal custodian of the minor children immediately notify the Cuyahoga Support Enforcement Agency (CSEA) of any reason for which the support order should terminate including, but not limited to, death, marriage, emancipation, high school completion/termination, enlistment in armed services, deportation or change of legal custody of the children.

The following information is provided for the use of the Cuyahoga Support Enforcement Agency (CSEA) in accordance with §3121.24 of the Ohio Revised Code:

OBLIGEE: NAME: Maureen C. Pruitt
ADDRESS: 8653 Hollis Lane,
Brecksville, Ohio 44141
SOCIAL SECURITY NO.: 156-54-0552
DATE OF BIRTH: 09-22-1957

OBLIGOR: NAME: Gary K. Pruitt
ADDRESS: 457 Timber Trail,
Brecksville, Ohio 44141
SOCIAL SECURITY NO.: 267-23-1408
DATE OF BIRTH: 05-19-1956

EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE CHILD SUPPORT ENFORCEMENT AGENCY IN WRITING OF HIS OR HER CURRENT MAILING ADDRESS, CURRENT RESIDENCE ADDRESS, CURRENT RESIDENCE TELEPHONE NUMBER, CURRENT DRIVER'S LICENSE NUMBER, AND OF ANY

CHANGES IN THAT INFORMATION. EACH PARTY MUST NOTIFY THE AGENCY OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT OR AGENCY, WHICHEVER ISSUED THE SUPPORT ORDER. IF YOU ARE THE OBLIGOR UNDER A CHILD SUPPORT ORDER AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATION, YOU MAY BE FINED UP TO $50 FOR A FIRST OFFENSE, $100 FOR A SECOND OFFENSE, AND $500 FOR EACH SUBSEQUENT OFFENSE. IF YOU ARE AN OBLIGOR OR OBLIGEE UNDER ANY SUPPORT ORDER ISSUED BY A COURT AND YOU WILLFULLY FAIL TO GIVE THE REQUIRED NOTICES, YOU MAY BE FOUND IN CONTEMPT OF COURT AND BE SUBJECTED TO FINES UP TO $1000 AND IMPRISONMENT FOR NOT MORE THAN 90 DAYS.

IF YOU ARE AN OBLIGOR AND YOU FAIL TO GIVE THE REQUIRED NOTICES, YOU MAY NOT RECEIVE NOTICE OF THE FOLLOWING ENFORCEMENT ACTIONS AGAINST YOU: IMPOSITION OF LIENS AGAINST YOUR PROPERTY; LOSS OF YOUR PROFESSIONAL OR OCCUPATIONAL LICENSE, DRIVER'S LICENSE, OR RECREATIONAL LICENSE; WITHHOLDING FROM YOUR INCOME; ACCESS RESTRICTION AND DEDUCTION FROM YOUR ACCOUNTS IN FINANCIAL INSTITUTIONS; AND ANY OTHER ACTION PERMITTED BY LAW TO OBTAIN MONEY FROM YOU TO SATISFY YOUR SUPPORT OBLIGATION.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the marital property acquired during the marriage, which period is from June 17, 1978 until July 28, 2003 shall be divided in accordance with this order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall continue to maintain the custodial accounts for the benefit of the children with Plaintiff and Defendant designated as custodians and requiring the approval of

both Plaintiff and Defendant for withdrawals.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to Ohio Revised Code §3105.171(A)(6) and (B), the following is determined to be separate property and is awarded as follows:

ITEM	PROPERTY OF:	AWARDED TO:
Jewelry	Plaintiff	Plaintiff

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is hereby awarded the following property as division of property, free and clear from any claim by Defendant:

ITEM:	VALUE:
8653 Hollis Lane, Brecksville, Ohio (Equity includes amount withdrawn by Plaintiff from Discover account and converted to this asset)	$50,000.00
Discover Account (additional amount previously withdrawn)	$1,270.00
My Bank Account (previously withdrawn)	$11,588.00
National City Bank Account (previously withdrawn)	$948.00
Ameritrade Account (previously withdrawn)	$38,421.00
Discover Account Refund (received by Plaintiff)	$49.00
1989 Chevrolet Van	$2,375.00
2002 Chevrolet Van (negative equity)	($1,514.00)

Plaintiff's Salomon Smith Barney IRA	$44,378.00
Plaintiff's Fidelity IRA	$6,850.00
Plaintiff's Social Security	$44,300.00
Household Furnishings and Personal Property (previouslyremoved)	$4,000.00
Plaintiff's Share of Defendant's Ernst & Young 401(k)	$107,358.50

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff pay and hold Defendant harmless on the following marital debts:

ITEM:	AMOUNT DUE:
MBNA Visa	$18,000.00
GMAC loan for 2002 Chevrolet Van	$37,240.00
Mortgage for 8653 Hollis Lane, Brecksville, Ohio	$220,000.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant is hereby awarded the following property as division of property, free and clear from any claim by Plaintiff:

ITEM:	VALUE:
Discover Account (previously withdrawn)	$54,000.00
8457 Timber Trail, Brecksville, Ohio (equity)	$126,787.00
US Bank Account	$21,285.00
Huntington National Bank Account	$136,904.00

1987 Pontiac	$875.00
2003 Chevrolet Van (equity)	$2,225.00
Grand Piano	$17,000.00
Defendant's Fidelity IRA	$6,858.00
Defendant's Share of Defendant's Ernst & Young 401(k)	$107,358.50
Defendant's Social Security	$105,956.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant pay and hold Plaintiff harmless on the following marital debts:

ITEM:	AMOUNT DUE:
Chase Visa	$19,950.00
Loan for 2003 Chevrolet Van	$39,734.00
GMAC loan secured by Timber Trail Property	$225,000.00
Mortgage for 8457 Timber Trail, Brecksville, Ohio	$87,057.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff be and she is hereby awarded as division of property Defendant's interest in the real estate located at 8653 Hollis Lane, Brecksville, Ohio 44141. Defendant is hereby ordered to execute a deed in favor of Plaintiff to said property; upon his failure to do so within five (5) days of the signing hereof, this decree shall operate as a conveyance therefor and the Clerk is directed to certify so much as is necessary of this decree to effectuate such conveyance to the County Auditor and

County Recorder.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant be and he is hereby awarded as division of property Plaintiff's interest in the real estate located at 8457 Timber Trail, Brecksville, Ohio 44141. Plaintiff is ordered to execute a deed in favor of Defendant to said property; upon her failure to do so within five (5) days of the signing hereof, this decree shall operate as a conveyance therefor and the Clerk is directed to certify so much as is necessary of this decree to effectuate such conveyance to the County Auditor and County Recorder.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff and Defendant shall each retain one half of the parties' travel rewards.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall retain her STRS account free of any claim by Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's counsel shall submit to this Court a Qualified Domestic Relations Order dividing Defendant's Ernst & Young 401(k) account as set forth in this judgment entry within 90 days of the date of jounalization of this judgment entry.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's counsel shall submit to this Court a Qualified Domestic Relations Order dividing Defendant's Ernst & Young Defined Benefit Retirement Plan as set forth in this judgment entry within 90 days of the date of journalization of this judgment entry.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's counsel shall submit to this Court an appropriate order dividing Defendant's Ernst & Young Supplemental Retirement Plan as set forth in this judgment entry within 90 days from the journalization of this judgment entry.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties' tax loss carry over shall be allocated equally between Plaintiff and Defendant for tax years beginning 2003.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall pay to Plaintiff, as property division, $172,769.00 within 90 days from the date of journalization of this judgment entry.

The Court determines that the foregoing constitutes an equal division of the property and debts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall pay to Plaintiff, as additional spousal support, expenses for her counsel fees in the sum of $50,000.00, for which judgment is rendered and execution may issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall maintain the Connecticut General life insurance policy convering his life in the amount of $1,020,000.00 with Plaintiff designated as beneficiary until the support ordered in this matter has terminated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall not encumber the Connecticut General life insurance policy.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant shall give written proof of coverage under the Connecticut General life insurance policy to Plaintiff within 30 days of journalization of this judgment entry and annually thereafter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant may substitute life insurance coverage provided he obtains written authorization from plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall not unreasonably withhold authorization for substitute life insurance coverage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant is permitted to claim the minor children for purposes of income tax exemption so long as he is current in his support obligations as of June 30and December31 of the corresponding tax year.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, with respect to all joint federal, state and local income tax returns filed or to be filed by the parties, and all adjustments and amendments thereto, the responsible party will hold the other party harmless from and indemnify the other party against all loss, damage, expense and liability, including without limitation deficiency assessments, penalties, interest, attorney fees and costs, which the other party incurs by reason of any act or omission of the responsible party.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all restraining orders previously issued by this Court are hereby dissolved and set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant pay the costs of this proceeding, for which judgment is rendered and execution may issue.

IT IS SO ORDERED.

/s/ Judge James P. Celebrezze
James P. Celebrezze
Judge

RECEIVED FOR FILING FEBRUARY 12, 2004
Gerald E. Fuerst, Clerk By_____, Dep.

[CLERK'S CERTIFICATE OMITTED/[VOL. AND PG. NOS. OMITTED]
SEP 6 — 2005

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
CUYAHOGA COUNTY, OHIO

MAUREEN C. PRUITT,	)CASE NO. D282858
	)
Plaintiff,	)JUDGE JAMES P. CELEBREZZE
	)
-vs-	)
	)
GARY K. PRUITT, *et al.*,	) JUDGMENT ENTRY *NUNC*
	) *PRO TUNC*
	) (Divorce Decree
Defendants.	) Filed February 12, 2004)

This matter was before the Honorable James P. Celebrezze on this ____ day of _____ 2004, upon motion of plaintiff Maureen C. Pruitt for relief from judgment pursuant to Civil Rule 60(A).

The Court finds that certain oversights and omissions occurred in the judgment entry of divorce herein, which oversights and omissions constitute clerical mistakes. Plaintiff's motion is therefore well taken.

IT IS THEREFORE ORDERED that the judgment entry of divorce in this mater, filed February 12, 2004, be and is hereby corrected due to clerical mistakes, The following paragraph at Volume 4271, page 0380, shall be omitted:

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the defendant shall pay to plaintiff, as property division, $172,769.00 within 90 days from the date of journalization of this judgment entry

IT IS FURTHER ORDERED that the following paragraph be and is hereby substituted for the paragraph that is omitted:

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the defendant shall pay to plaintiff, as property division, $133,638.00 within 90 days from the date of journalization of this judgment entry.

IT IS ORDERED that this judgment entry shall be effective *nunc pro tunc* to February 12, 2004.

IT IS SO ORDERED.

/s/ Judge James P. Celebrezze 02-23-04
JUDGE JAMES P. CELEBREZZE

APPROVED:

/s/ Deborah A. Parry
Deborah Akers-Parry (0017997)
Attorney for plaintiff

RECEIVED FOR FILING
FEB 23, 2004

[CLERK'S CERTIFICATION ATTACHED TO ORIGINAL OMITTED IN THIS REPRODUCTION]

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CUYAHOGA COUNTY
COURT OF COMMON PLEAS
GERALD E. FUERST-
CLERK OF COURTS
JUSTICE CENTER-COURT TOWER
1200 ONTARIO ST
CLEVELAND, OHIO 44113
TEL: (216)443-8800

JE NOTICE
Notice 6854058
Date 07/01/2005

Journal Date:
06/28/2005 10:48 AM

CASE INFORMATION

Case: DR01282858

Plaintiff: MAUREEN C. PRUITT

Judge:
JAMES P. CELEBREZZE

Defendant:
GARY K. PRUITT ET AL

GARY K. PRUITT FOUND IN CONTEMPT OF COURT ON PLTF'S MTN NO. 173621 (SPOUSAL AND CHILD SUPPORT). THE COURT FINDS THAT HE HAS PURGED HIS CONTEMPT BY EXECUTING AND DELIVER A DEED...VOL 4527, PAGE 330-334 O.S.J. NOTICE ISSUED

[THIS DOCUMENT HAS BEEN REPRODUCED FOR PURPOSES OF SUBMITTAL TO THE U.S. SUPREME COURT]

Case No: 86779

MAUREEN C. PRUITT VS.
GARY K. PRUITT

SUA SPONTE, APPEAL IS DISMISSED AS MOOT. R.C. 2505.02. IN RE: RALPH WATTS (JAN. 31, 2002), CUYAHOGA APP. NOS. 78713, 78991.

DYKE, A., J., CONCUR
BLACKMON, P., P.J.

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FROM:
Court of Appeals of Ohio
Eighth Appellate District
One Lakeside Ave.
Cleveland, Ohio 44113
Date: 08/01/2005

TO:
WILLIAM P. GIBBONS
1525 LEADER BUILDING
526 SUPERIOR AVENUE, N.E
CLEVELAND, OH 44114-1444

APPENDIX "D"
(Pg. 1 of 1)

BEST AVAILABLE COPY

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 84335 & 85531

MAUREEN C. PRUITT,	:	
	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
v.	:	
	:	OPINION
GARY K. PRUITT,	:	
	:	
Defendant -Appellant	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION: AUGUST 25, 2005

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Domestic Relations Division, Case No. D-282858.

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

DATE OF JOURNALIZATION: SEP 6 2005

[THIS DOCUMENT HAS BEEN REPRODUCED FOR PURPOSES OF SUBMITTAL TO THE U.S. SUPREME COURT]

APPEARANCES:

For Plaintiff-Appellee:

Deborah Akers-Parry
Wolf & Akers
1717 East Ninth Street
1515 The East Ohio Building
Cleveland, OH 44114

For Defendant-Appellant:

William P. Gibbons
Joseph F. Shucofsky
1525 Leader Building
526 Superior Avenue East
Cleveland, OH 44114-1444

CHRISTINE T. McMONAGLE, J.:

Defendant-appellant, Gary K. Pruitt ("Husband"), appeals the judgment of the Common Pleas Court, Domestic Relations Division, that granted him and plaintiff-appellee, Maureen C. Pruitt ("Wife"), mutual divorces, adopted an agreed shared parenting plan, divided the couple's marital property, and ordered that he pay child support and spousal support.

The record reveals that the Pruitts were married on June 17, 1978, and have three children, ages 11 through 17. Husband is a certified public account ("CPA") with an annual salary of $177,109.33. Wife also is a CPA but has not worked outside the

home since 1987. She was recently certified to teach Spanish and has been unsuccessfully seeking employment in that field, in which her earnings would be approximately $23,700 per year. She is enrolled in a Master's Degree program in Spanish and earns $2,100 per semester from her teaching assistantship, which she spends on books, supplies, and transportation.

The trial court ordered that Husband pay Wife $810.82 per month per child for the support of the children, totaling $2,432.46 per month for the three minor children. Additionally, he was ordered to pay for the children's medical insurance; Husband and Wife were to split any uninsured expenses 65.35%/35.65% respectively. The court ordered Husband to pay $5,100 per month for spousal support for a period of eight years, with a retention of jurisdiction, and ordered him to pay $50,000 of Wife's attorneys fees as additional support. He was further ordered to maintain a $1,020,000 life insurance policy with Wife designated as beneficiary until his support obligations ended.

On March 9, 2004, the trial court entered a Qualified Domestic Relations Order ("QDRO") regarding an Ernst & Young Defined Benefit Retirement Plan in which Husband is a

participant. Husband appealed the judgment of divorce on March 12, 2004. The trial court amended the QDRO on October 12, 2004. Husband appealed from that order on November 12, 2004, and the appeals were consolidated.

In his ten assignments of error, Husband challenges virtually every decision the trial court made.

SOCIAL SECURITY BENEFITS

In his first assignment of error, Husband argues that the trial court erred by including the parties' potential Social Security benefits among their marital assets. First, he argues that the valuation of benefits by Wife's expert was erroneous because it was based on improper assumptions and contends that his expert properly determined the present value of the parties' Social Security because that opinion "was based upon methodology consistent with Ohio law and reasonable assumptions." The weight of the evidence and the credibility of witnesses, however, are primarily for the trier of fact to determine. *Slate v. DeHass* (1967), 10 Ohio St.2d 230.

Second, Husband argues that the trial court erred by "dividing," rather than "considering," Social Security benefits

when dividing the marital property. Federal law prohibits any transfer or assignment of Social Security benefits, and, in general, protects them from execution, levy, attachment, garnishment, or other legal process. 42 U.S.C. §407(a). Therefore, the Ohio Supreme Court has held that Social Security benefits themselves are not subject to division in a divorce proceeding. *Neville v.* Neville (2003), 99 Ohio St.3d 275. Nevertheless, "a trial court, in seeking to make an equitable distribution of marital property, may *consider* the parties' future Social Security benefits in relation to all marital assets." Id. at 276-277 (emphasis added). In other words, "although a party's Social Security benefits cannot be divided as a marital asset, those benefits may be considered by the trial court *** as a relevant and equitable factor in making an equitable distribution." Id. at 278.

Here, the trial court included a valuation for each party's anticipated Social Security benefits in its description of the parties' assets. It then included each party's Social Security benefits in its listing of their portion of the property division. We do not perceive this to be a "dividing" of the party's Social Security benefits. Rather, the effect of the trial court's

consideration of the valuation of each party's anticipated benefits was to offset the Wife's lower Social Security benefits against other property of marriage. This falls within the guidelines of *Neville.*

Appellant's first assignment of error is overruled.

SPOUSAL AND CHILD SUPPORT

In his second assignment of error, Husband challenges the trial court's order that he pay $5,100 per month in spousal support for eight years and $2,432.46 per month in child support (both figures include a 2% processing fee).

The trial court enjoys broad discretion in awarding spousal support to either party when it is appropriate and reasonable to do so. *Glass v. Glass* (Dec. 22, 2000), Lake App. No. 99-L-120. Such an award will not be disturbed on appeal absent an abuse of discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Spousal support is allocated according to the factors found

in R.C. 3105.18(C) (1)

"(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 [3105.17.11 of the Revised Code;

"(b) The relative earning abilities of the parties;

"(c) The ages and the physical, mental, and emotional conditions of the parties;

"(d) The retirement benefits of the parties;

"(e) The duration of the marriage;

"(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

"(g) The standard of living of the parties established during the marriage;

"(h) The relative extent of education of the parties;

"(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

"*,* *

"(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

"(l) the tax consequences, for each party, of an award of spousal support;

"(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

"(n) Any other factor that the court expressly finds to be relevant and equitable."

The record reflects that the trial court considered these factors in making its award of spousal support. It noted that this was a marriage of 25 years duration and Wife had not worked outside the home since the couple's first child was born in 1987, but was, at time of trial, pursuing a Master's Degree to teach Spanish. The trial court further found that Wife's monthly living expenses were $7,065, while Husband's were $5,071. Husband had an income of $177,000; Wife's earning potential as a teacher was $23,700, although her actual income was $4,200.

Husband complains, however, that Wife is voluntarily underemployed and, therefore, the trial court failed to impute income to Wife consistent with her earning ability in her former field of accounting or, at the very least, as an entry-level school teacher. We disagree.

If the court determines that a parent is voluntarily unemployed or underemployed, it may impute to that parent income which it determines the parent would have earned if fully employed. R.C. 3113.215 (A) (5). Whether a parent is voluntarily underemployed and the amount of potential income to be imputed are matters to be determined by the trial court in light of the facts and circumstances of each case. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, at the syllabus. The determination will not be reversed on appeal absent an abuse of discretion. Id.

The evidence presented at trial demonstrated that Wife had made appropriate efforts to find teaching employment, but was unable to do so, and was enrolled in a Master's Degree program to improve her job opportunities. The evidence further indicated that Wife had previously worked as an accountant only because she could not find a teaching job, had not worked in that field since

1987 when the couple's first child was born, would have to take 80 hours of schooling to reactivate her CPA license, and would be able to obtain only an entry-level accounting position even if she updated her credentials. In light of this evidence, the trial court did not abuse its discretion in finding that Wife was not voluntarily underemployed.

Moreover, we note that the trial court retained jurisdiction to modify both the child and spousal support orders upon a substantial change in circumstances. Thus, if Wife eventually obtains employment at a significantly higher rate of pay, Husband may petition the court to modify spousal support. Accordingly, the trial court did not abuse its discretion in ordering Husband to pay Wife $5,100 per month in spousal support.

We are also not persuaded by Husband's argument that Wife's living expenses are excessive. It is for the trial court to resolve disputes of fact and weigh the testimony and credibility of the witnesses. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23.

Here, the evidence presented at trial demonstrated that Husband and Wife are living comparable lifestyles and Husband's expenses are not so different from Wife's as to permit him to

complain about her cost of living. Accordingly, Husband has not demonstrated that the trial court abused its discretion in making its determinations regarding this factual issue.

Husband has also not demonstrated that the trial court's award of eight years of spousal support under these circumstances was an abuse of discretion. Eight years of support after a 25-year marriage is reasonable and appropriate in this case considering the parties' relative earning abilities, Wife's need to professionally rehabilitate, and the ages of the children and their need for care.

Finally, Husband contends that the trial court erred in ordering that he maintain a life insurance policy to secure spousal support. The judgment entry ordered Husband to maintain a life insurance policy, with Wife designated as the beneficiary "in order to assure the payment of support." Later, the order states that Husband shall maintain the life insurance policy, with Wife designated as beneficiary "until the support ordered in this matter has terminated." The order does not specify whether the support to be secured is spousal or child support.

To the extent that the order could be construed as ordering Husband to maintain a life insurance policy to secure spousal support, we agree with Husband that the order is improper. In *Robiner v. Robiner* (Dec. 7, 1995), Cuyahoga App. No. 67195, this court reaffirmed its prior holding in *McCoy v. McCoy* (1993), 91 Ohio App.3d 570, that security in the form of life insurance is inappropriate for spousal support payments. R.C. 3105.18(B) provides that spousal support terminates upon the death of either party and, by requiring the obligor to maintain the ex-spouse as a beneficiary, the trial court is, in effect, providing the ex-spouse with a spousal support award after the death of the obligor. Id.

To the extent that the order could be construed as securing child support, however, the order is not improper. It is appropriate to secure a child support obligation by ordering that the children be named as beneficiaries of the parent's life insurance policy until they reach the age of majority. *Gillespiev. Gillespie* (June 30, 1994), Cuyahoga App. No. 65518.

Here, it is not clear whether the trial court ordered Husband's life insurance policy to secure child or spousal support. The order requires Wife to be named as beneficiary of the policy.

If the order was intended to secure child support, it should have specified that the children be named as beneficiaries until Husband's duty of child support ends. Accordingly, the court's order regarding Husband's life insurance policy is reversed and the matter is remanded for modification or correction of the entry consistent with this opinion.

With respect to child support, R.C. 3119.21 contains guidelines, based upon the income of the parents and the number of children, for child support cases in which the combined income of the parents is between $6,000 and $150,000. The court is required to award the amount of support designated in the guidelines unless it finds that the amount in the guideline would be unjust or inappropriate and would not be in the best interest of the child or children. If the court makes this determination in a case which falls within the guidelines, it must provide its reasons for deviating from that amount. A list of reasons for deviating is found in R.C. 3119.22.

As this court pointed out in *Cyr v. Cyr,* Cuyahoga App. No. 84255, 2005-Ohio-504, child support guideline calculations for families where the parents' combined income exceeds

$150,000 are not available in a statute. R.C. 3119.04(B), the statute for combined income above $150,000, provides:

"If the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court, with respect to a court child support order, or the child support enforcement agency, with respect to an administrative child support order, shall determine the amount of the obligor's child support obligation on a case-by-case basis and shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents. The court or agency shall compute a basic combined child support obligation that is no less than the obligation that would have been computed under the basic child support schedule and applicable worksheet for a combined gross income of one hundred fifty thousand dollars, unless the court or agency determines that it would be unjust or inappropriate and would not be in the best interest of the child, obligor, or obligee to order that amount. If the court or agency makes such a determination, it shall enter in the journal the figure, determination, and findings."

Husband argues that the trial court failed to make findings to support its deviating from the highest amount on the guidelines. No such findings are necessary.

This court addressed the same issue in *Cyr*, supra. We held that the statute requires the court to make findings only if the amount of child support awarded deviates *below* the maximum figure on the guidelines:

"The revised statute for combined incomes above $150,000, R.C. 3119.04(B), eliminated the requirement that the court extrapolate to determine the appropriate amount of child support when the parents' incomes exceeded $150,000. Instead, the statute leaves the determination entirely to the court's discretion, unless the court awards less than the amount of child support listed for combined incomes of $150,000. In terse language, the statute further says that when the court awards less than that amount it is required to 'enter in the journal the figure, determination, and findings.' R.C. 3119.04(B). Previously, that requirement applied to all awards of child support, including those where the combined income was above $150,000. Under the revised statute, the requirement applies only to awards where the

combined income is less than $150,000. However, in making its determination, the court is required to "consider the needs and the standard of living of the children who are the subject of the child support order and of the parents." Id. at ¶54.

Accordingly, the trial court is free to determine any amount *above* the guideline maximum without providing any reasons. Therefore, contrary to Husband's argument, the trial court was not required to give its reasons for deviating above the guidelines.

Husband also argues that the trial court erred in assigning the full amount of child support to him. We agree.

The worksheet attached to the trial court's judgment entry indicates that the court calculated child support based upon the parties' combined incomes of $176,483.14, which included Husband's income of $113,567.14 after spousal support, or 64.35% of the total income, and Wife's income of $62,916 after spousal support, or 35.65% of the total income. The worksheet indicates that the combined child support obligation is $25,823. Although the worksheet correctly allocates $16,617.10 (64.35% of $25,823) as Husband's annual child support obligation and

$9,205.90 (35.65% of $25,823) as Wife's, the judgment entry orders that Husband pay $2,432.36 per month in child support, for an annual total of $29,189.52 (including the 2% processing charge) . Thus, the judgment entry incorrectly orders Husband to pay 100% of the child support obligation. Accordingly, the court's order of child support is reversed and the case remanded for correction of child support obligations consistent with the figures calculated on the worksheet.

Finally, Husband argues that the judgment entry orders him to pay the first $100 of uninsured medical expenses, although the shared parenting plan, expressly adopted by the judgment entry, indicates that Wife would pay this amount. It is unclear whether this was an oversight by the trial court or an attempt to override the shared parenting plan. In any event, the judgment is inconsistent and should be corrected upon remand.

Appellant's second assignment of error is therefore sustained in part and overruled in part.

QUALIFIED DOMESTIC RELATIONS ORDER -

DEFINED BENEFIT PLAN

Husband's third assignment of error challenges the QDRO entered by the trial court to divide the parties' interests in the "Ernst & Young Defined Benefit Plan."

Initially, we reject Wife's argument that Husband's appeal of the QDRO is untimely. The judgment entry appealed by Husband on March 12, 2004 held that "Defendant has an Ernst & Young Defined Benefit Retirement Plan and that the parties have stipulated that the account not be valued and should be divided equally between Plaintiff and Defendant, whatever the value may be, by an appropriate Qualified Domestic Relations Order." Accordingly, Husband's timely appeal of the judgment entry of divorce included a timely appeal of the QDRO.

Husband argues that the trial court erred by failing to determine a present value of the Retirement Plan and segregate Wife's interest in the Plan from his at the time of the divorce. In short, Husband contends that the Amended QDRO gives Wife access to contributions he will make to the Plan after the divorce, thereby depriving him of his after-divorce separate property.

Husband argues further that the QDRO improperly gives Wife a prorata share of any early retirement benefits or subsidies. Husband's argument is without merit.

Retirement benefits or the right to receive retirement benefits accumulated during the marriage are marital property, which the court must equitably divide and distribute between husband and wife in a divorce. R.C. 3105.171(A) (3) (a) (i). The court has broad discretion in dividing the benefit. An equal division is presumed under the statute to be an equitable division. In order to reach an equitable result, the court should attempt to preserve the pension or retirement asset in order that each party can procure the most benefit, while disentangling the parties' economic partnership so as to create a conclusion and finality to their marriage. *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177.

The retirement plan at issue in this case is a defined benefit plan. Under this type of plan, the actual value that will be the subject of the court's equitable distribution can be determined only by future contingencies such as the participant's age and pension service credits at retirement. *Ferris v. Ferris* (Feb. 20, 2001), Fairfield App. No. 00 CA 58, citing *Layne v. Layne* (1992),

83 Ohio App.3d 559.

In *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, the Ohio Supreme Court recognized a proper method of distribution for such a situation:

"In a situation involving vested but unmatured retirement benefits, the trial court may reserve jurisdiction and either determine the parties' proportionate shares at the time of the divorce or determine proportionality when the benefits become vested and matured. In determining the proportionality of the pension or retirement benefits, the non-employed spouse, in most instances, is only entitled to share in the actual marital asset. The value of this asset would be determined by computing the ratio of the number of years of employment of the employed spouse during the marriage to the total years of his or her employment."

Thus, "when the amount to be paid can only be determined at the later point of maturity at retirement, a current order should divide and distribute only the right to receive a share of the unmatured pension benefit, reserving determination of exact amounts to the later time when they are known. This method serves both objectives of an equitable division; it disentangles the

affairs of the parties while producing an optimum value for each." *Layne,* supra at 566. See, also, *Sprankle v. Sprankle* (1993), 87 Ohio App.3d 129, 134 ("Where a trial court is not going to liquidate a pension immediately but orders the benefits to be divided and paid when they are ultimately paid by the pension plan., it does not have to determine the present value of the benefits at the time of the judgment.")

That is exactly what happened here. Section 6 of the Amended QDRO gives Wife the right to receive 50% of the Marital Portion of the accrued benefit upon the benefit commencement date; Marital Portion is determined by computing the ratio of the number of years of Husband's employment during the marriage (25) to Husband's total years of employment.

We reject Husband's assertion that this division improperly deprives him of his post-divorce contributions to the Plan. "A retirement plan is an investment made by both spouses during marriage to provide for their later years. They anticipate that the value of the investment will increase with time. At divorce, each spouse is entitled to the value of his or her investment. When the investment has not yet matured, each is

entitled to a right to its value at maturity in proportion to the years of marriage. The nonemployed former spouse is not entitled to share in the direct contributions made by the participant former spouse after divorce. However, the nonemployed former spouse is entitled to the benefit of any increase in the value of his or her unmatured proportionate share after divorce attributable to the continued participation of the other spouse in the retirement plan. That increase was contemplated when the investment was made. It would be inequitable to deprive the owner of its value. So long as each former spouse is limited to his or her proportionate right to share, there is neither unjust enrichment of the nonparticipant nor an inequitable deprivation of his or her rights." *Layne,* supra, at 567.

Appellant's third assignment of error is overruled.

SUPPLEMENTAL RETIREMENT PLAN

In his fourth assignment of error, Husband argues that the trial court erred in dividing his Ernst and Young Supplemental Retirement Plan between the parties. Husband contends that because he is not yet vested in the Plan, it has no value, and hence, there is nothing to divide. We disagree.

"Whether vested or otherwise, pension and retirement benefits have value." *Haller v. Haller* (Mar. 18, 1996), Warren App. No. "As with all valuable assets accumulated during a marriage by either spouse, these benefits may be found to be marital property by a trial court and, if so, must be considered in the equitable division of marital assets." Id. See, also, *Lemon v. Lemon* (1988), 42 Ohio App.3d 142, 144. ("An unvested pension plan has a value.")

Husband also argues that the Supplemental Retirement Plan should not be divided because it is not covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). Although a non-covered plan is not subject to a QDRO, the trial court did not enter a QDRO dividing the Supplemental Plan. Accordingly, we find no error in its division.

We note, however, that in the judgment entry of divorce, the trial court ordered that the Supplemental Plan be divided as part of the property division, whereas in its judgment entry dated March 9, 2004, the trial court characterized Wife's benefit in the plan as spousal support. Accordingly, the trial court's order is reversed and remanded for correction of the payment as property

division, rather than spousal support.

Appellant's fourth assignment of error is sustained in part and overruled in part.

INHERITANCE

In his fifth assignment of error, Husband argues that the trial court erred in finding that his inheritance from his mother was marital, rather than separate, property.

R.C. 3105.171(A) (6) (a) (i) states:

"'Separate property' means all real and personal property and any interest in real or personal property that is found by the court to be any of the following:

"An inheritance by one spouse by bequest, devise, or descent during the course of the marriage."

The statute further states that "the commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." Id.

Thus, separate property may be converted to marital property when it is commingled with marital property. *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. The party seeking to have

a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property. *Cimperman v. Cimperman,* Cuyahoga App. No. 80807, 2003-Ohio-869, at ¶9, citing *Peck,* supra.

Husband first contends that the trial court erred in determining that a grand piano purchased in 1997 was marital property because the evidence at trial demonstrated that he received a distribution from his mother's estate in the amount of $20,328.51, deposited the money in his separate bank account, then immediately disbursed funds from this account to the parties' joint marital account to purchase the piano. Other evidence at trial, however, indicated that funds already on deposit in the marital account were sufficient to purchase the piano and the inheritance was commingled with other monies in the fund, making it impossible to trace the inheritance to the grand piano. The trial court was free to weigh this conflicting testimony and make its decision accordingly. See *Buckles v. Buckles* (1988), 46 Ohio App.3d 102, 110. In light of the conflicting evidence, the trial court did not err in finding that Husband had not proved by a preponderance of the evidence that the funds used to purchase the

piano were sufficiently traceable so as to render the piano separate property.

Husband also claims that various annuity payments (apparently from his mother's estate) he received and deposited in his separate account were separate, rather than marital, property. Evidence at trial, however, demonstrated that these funds were likewise commingled with marital property, even in Husband's separate account. Accordingly, the trial court did not err in determining that the monies were not separate property.

Appellant's fifth assignment of error is overruled.

LIABILITIES

Husband's sixth assignment of error challenges the trial court's determination that two credit card account balances were marital debts. He claims that Wife incurred these charges after the parties separated and for her personal debts, so they should have been allocated to her individually.

Marital debt is "any debt incurred during the marriage for the joint benefit of the parties or for a valid marital purpose." *Mencini v. Mencini,* Cuyahoga App. Nos. 83638 and 83820, 2004-Ohio-3125. A court is required to equitably divide and distribute

the parties' marital property, including assets and liabilities. R.C. 3105.171; *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93.

Because both credit card debts were incurred prior to July 28, 2003, the termination of the marriage, they were incurred during the marriage. They were also incurred for the joint benefit of both parties or a valid marital purpose. Husband argues that some of the monies were used to replace a furnace in Wife's home, paint the home, and pay the mortgage on the home. Because the house was a marital asset, however, these expenses were obviously for a valid marital purpose. Moreover, Husband's contention that some of the monies were used to pay Wife's attorneys is based on speculation as these were cash loans on credit cards. The trial court did not err in holding that the credit card debts incurred prior to the termination of the marriage were marital liabilities.

Appellant's sixth assignment of error is overruled.

U.S. BANK ACCOUNT

In his seventh assignment of error, Husband complains that the trial court erred in finding that a bank account that he opened after Wife moved out of the marital home was marital

property. He claims that because he was already paying spousal support to Wife at this time, the account should be his separate property. Marital property is generally presumed to include all property acquired during the marriage. *Dudich v. Dudich,* Cuyahoga App. No. 84742, 2005-Ohio-889, at ¶31. Once a trial court has classified the property as either marital or separate, review of that determination is limited to the standard of manifest weight of the evidence. *Marcum* V. *Marcum* (1996), 116 Ohio App.3d 606. This standard of review is highly deferential and only some evidence is sufficient to sustain the judgment and prevent a reversal. *Dudich,* supra, citing *Barkley v. Barkley* (1997), 119 Ohio App.3d 155.

Here, the account was opened during the marriage. We find no reason to reverse the trial court's judgment that a bank account containing income accumulated during the marriage was marital property.

Appellant's seventh assignment of error is overruled.

DATE OF TERMINATION OF MARRIAGE

In his eighth assignment of error, Husband argues that the trial court erred in determining that the marriage terminated on the

first day of trial.

The date of the final hearing is presumed to be the appropriate date of termination of the marriage unless the court, in its discretion, finds that use of this date would be inequitable. R.C. 3105.17(A) (2); *Badovick v. Badovick* (1998), 128 Ohio App.3d 18, 22.

Husband argues that the date of the marriage should have been October 5, 2001, when Wife filed her complaint for divorce. He contends that no attempts to reconcile were made after June 2001, and, after she filed for divorce, Wife unilaterally began dividing marital property by withdrawing $50,000 from the parties' Discover account and eventually purchasing her own home.

Wife, on the other hand, produced evidence at trial that Husband's abusive behavior forced her to move from the marital home. Wife also produced evidence that since March 2001, Husband had denied her access to any monies, which denial forced her to retrieve a portion of joint funds for legitimate household and family expenditures.

In light of this evidence, we cannot find that the trial court abused its discretion in determining that the date of trial was the termination date of the marriage.

Appellant's eighth assignment of error is overruled.

ATTORNEY FEES

In his ninth assignment of error, Husband complains that the trial court erred in awarding Wife $50,000 in spousal support to pay her attorney fees.

It is well established that a trial court's decision to award attorney fees will not be disturbed on appeal absent a clear abuse of discretion. *Szymczak v. Szymczak* (2000), 136 Ohio App.3d 706, 715. "A trial court's decision to award or not to award attorney fees should take into consideration the factors of R.C. 3105.18, specifically the earning abilities of the parties and the relative assets and liabilities of each." *Birath v. Birath* (1988), 53 Ohio App.3d 31, 39.

R.C. 3105.18(H) provides:

"In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, *** if it determines that the other party has the

ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney's fees."

In addition, R.C. 3105.171(E) provides that "if a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property."

Husband first contends that the trial court erred in ordering him to pay $50,000 of Wife's attorney fees because there is no evidence that, without the award, she would have been prevented from fully litigating and protecting her interests. Husband argues that Wife was able to pay some of her attorney fees prior to the award, had sufficient funds to buy a house and purchase household items, and had monies to obtain various experts to assist her in the litigation. Therefore, he contends, she had sufficient funds to adequately protect her interests in the litigation.

We are not persuaded.

The evidence at trial demonstrated that Wife's income was significantly less than Husband's and that she had borrowed money to pay her attorney and household expenses. The fact that Wife was able to borrow money to pay her attorney does not mean that she would be able to pay the remaining fees without an adequate award. Moreover, Husband's argument that Wife was not prevented from protecting her interests because she retained experts to assist her is without merit. Apparently Husband would have the court award attorney's fees only if Wife's financial situation prevented her from participating in the litigation at all. That is not the standard, however.

Husband also argues that the trial court erred in awarding attorney fees to Wife as spousal support. Pursuant to R.C. 3105.171(E), attorney fees awarded to compensate a party for the financial misconduct of the other party may only be awarded as a "distributive award" or "a greater award of marital property." Here, the trial court found that "much of Plaintiff's attorney fees were made necessary by Defendant's misconduct throughout the pendency of this matter." Husband argues, therefore, that in light

of this finding, the court could have awarded attorney fees as part of Wife's award of marital property, but could not order them paid as spousal support. Husband's argument is without merit.

In addition to its finding that Husband's misconduct unnecessarily increased Wife's attorney fees, the court also found that Wife would be prevented from fully litigating her interests absent an award of attorney fees, and that Husband had the financial ability to pay $50,000 of Wife's fees. Thus, the trial court's finding that Husband's misconduct had increased the attorney fees was one, but not the only, factor in its decision to award fees. In light of its findings, the trial court did not abuse its discretion in awarding attorney fees as spousal support pursuant to R.C. 3105.18(H).

Appellant's ninth assignment of error is overruled.

HUSBAND'S 401(K) PLAN

A property division in a divorce decree may be enforced by contempt proceedings. *Harris v. Harris* (1979), 58 Ohio St.2d 302. Here, the judgment entry ordered Husband to pay Wife $133,638 within 90 days from the journalization of the entry. Husband did not do so and, accordingly, on June 14, 2004, Wife

filed a motion to show cause as to why Husband should not be held in contempt. Wife's motion was by resolved by entry of an Agreed Judgment Entry on November 1, 2004, which set forth the agreement of the parties as follows:

"The Court finds that, by decree filed February 12, 2004, as corrected by entry filed February 23, 2004, defendant owes plaintiff one hundred thirty-three thousand six hundred thirty-eight dollars ($133,638.00), which was due by May 12, 2004, of which fifty-thousand dollars ($50,000) was paid on August 24, 2004; other property division, which has not been paid; and the sum of fifty thousand dollars ($50,000) for attorney fees, which has not been paid. Defendant was to facilitate the transfer of his retirement interest, which he has not transferred.

"It is therefore ordered that, of the sum of one hundred thirty-three thousand six hundred thirty-eight dollars ($133,638.00), the collection of forty-eight thousand six hundred thirty-eight dollars ($48,638.00) is hereby stayed pending appeal. The balance of eighty-five thousand dollars ($85,000.00) shall be paid as follows: fifty thousand dollars ($50,000.00) by check on August 23, 2004; thirty-five thousand dollars ($35,000.00) by

transfer from the Ernst and Young 401(k) plan (defined contribution plan) forthwith, provided, however, that an additional amount shall be paid at the same time from the defined contribution plan to compensate plaintiff for her tax liability on the thirty-five thousand dollars ($35,000.00) payment. That additional amount shall be ten thousand dollars ($10,000.00).

"It is further ordered that the domestic relations order against defendant's Ernst and Young defined contribution plan shall provide that plaintiff is to receive (a) 50% of the value of the plan plus (b) fifty thousand dollars ($50,000.00) payable from defendant's half of the plan (representing plaintiff's attorney fee award) plus (c) the forty-five thousand dollars ($45,000.00) described herein above, also payable from defendant's half of the defined contribution plan." The QDRO was amended in conformity with this agreed judgment entry.

Husband now argues that the trial court erred in entering the Amended ODRO regarding his Ernst & Young Defined Contribution Plan. Husband argues that the Amended QDRO regarding the Contribution Plan is inconsistent with the judgment entry of divorce because it awards Wife 50% of the account

balance in the Plan as of July 7, 2003, plus $95,000 or, if less, the entire amount of the account determined as of the date a separate account is established for Wife, as opposed to an award of $107,358.50 in the judgment entry. Husband complains that the trial court did not retain jurisdiction to modify its property division and, therefore, any such modification is prohibited.

The general rule in Ohio is that a trial court does not retain jurisdiction to alter a division of marital property once it becomes final. *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, paragraph one of the syllabus; R.C. 3105.171(I) ("A division or disbursement of property or a distributive award made under this section is not subject to future modification by the court.")

Nevertheless, "while a trial court does not have continuing jurisdiction to modify a marital property division incident to a divorce or dissolution decree, it has the power to clarify and construe its original property division so as to effectuate its judgment." *DiFrangia v. DiFrangia,* Trumbull App. No. 2003-T-0004, 2003-Ohio-6090, at ¶10, quoting *Gordon v. Gordon* (2001), 144 Ohio App.3d 21, 23. A QDRO has been described as "merely an order in aid of execution on the property division ordered in the

divorce decree." *McKinney v. McKinney* (2001), 142 Ohio App.3d 604, 608. "Accordingly, it is not necessary for a court to expressly reserve jurisdiction in the division of property order to issue a QDRO to effect the provisions of a property settlement." *DiFrangia,* supra, at ¶24.

Here, the Amended QDRO was necessary to effect the provisions of the court's prior order of divorce because Husband had not complied with the court's order of property division. This was not a redistribution of property but an order by the trial court to enforce the property and spousal support provisions of the original divorce decree. A court has jurisdiction to issue orders in aid of relief previously granted.

Moreover, in order to avoid a finding of contempt for his failure to comply with the court's order, Husband *agreed* to the provisions of the judgment entry modifying the QDRO. Accordingly, we find Husband's argument at this late date that the court lacked jurisdiction to enter the Amended QDRO specious.

Appellant's tenth assignment of error is overruled. Affirmed in part, reversed in part and remanded.

This cause is remanded for further proceedings consistent with the opinion herein.

It is, therefore, ordered that appellee recover from appellant costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/ Christine J. McMonagle

Diane Karpinski, P.J., and
Kenneth A. Rocco, J., Concur.

Filed and Journalized
Per App.R.22(E)
Sep 6 2005
Gerald E. Fuerst, Clerk
of the Court of Appeals

Announcement of Decision Per
App.R.22(B), 22(D) and 26(A)
Received August 25, 2005
Gerald E. Fuerst, Clerk
of the Court of Appeals

[SIGNATURES AND CLERK'S CERTIFICATES OMITTED]

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A) (1).

Court of Appeals of Ohio, Eighth District
County of Cuyahoga,
Gerald E. Fuerst, Clerk of Courts

MAUREEN C. PRUITT
Appellee

COA NO. 86779 LOWER COURT NO. CP D-282858
DOMESTIC RELATIONS

-vs-

GARY K. PRU ITT
Appellant

MOTION NO. 374278

Date 08/01/05

Journal Entry

SUA SPONTE, APPEAL IS DISMISSED AS MOOT. R.C. 2505.02. IN RE: RALPH WATTS (JAN. 31, 2002), CUYAHOGA APP. NOS. 78713, 78991.

[FILED AND JOURNALIZED PER APP.R. 22(E) SEP 19 2005 GERALD E. FUERST CLERK OF THE COURT OF APPEALS]

[ANNOUNCEMENT OF DECISION PER APP. R. 22(B), 22(D) AND 26(A); RECEIVED AUG 1 - 2005 GERALD E. FUERST CLERK OF THE COURT OF APPEALS]

Judge ANN DYKE, Concurs

/s/ Patricia A. Blackmon
Administrative Judge

[CERTIFICATES, BAR CODES AND VOL. NOS. OMITTED.]

N.B. This entry is an announcement of the courts decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision

will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the courts decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this courts announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

[THIS DOCUMENT HAS BEEN REPRODUCED FOR PURPOSES OF SUBMITTAL TO THE U.S. SUPREME COURT]

The Supreme Court of Ohio

FILED
JANUARY 25, 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Maureen C. Pruitt

Case No. 05-1968

v.

ENTRY

Gary K. Pruitt

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals; No. 86779)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

[THIS DOCUMENT HAS BEEN REPRODUCED FOR PURPOSES OF SUBMITTAL TO THE U.S. SUPREME COURT]

The Supreme Court of Ohio

FILED
JANUARY 25, 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Maureen C. Pruitt

Case No. 05-1971

v.

ENTRY

Gary K. Pruitt

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals; Nos. 84335 and 85531)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

[THIS DOCUMENT HAS BEEN REPRODUCED FOR PURPOSES OF SUBMITTAL TO THE U.S. SUPREME COURT]